



**State & Federal Contractors
Water Agency**

1121 L Street, Suite 802, Sacramento, CA 95814

September 15, 2010

Delta Stewardship Council
650 Capitol Mall
Sacramento, CA 95814

Re: Proposed Administrative Procedures Governing Appeals
Standard of Review of DFG BDCP Certifications

Dear Chairman Isenberg and Council Members:

Your August 26 discussion regarding the Council's standard of review of the Department of Fish and Game's (DFG) certification of the Bay Delta Conservation Plan (BDCP) as a Natural Communities Conservation Plan (NCCP) and as satisfying the CEQA criteria spelled out in the Delta Protection Act (Act) Section 85320 was illuminating and welcome. The issue of "deference" to administrative actions is an important one, and to echo a comment made at your meeting, we do not believe "deference" means the Council is to be a "potted plant" in carrying out its responsibilities. Nevertheless, deference is appropriate and consistent with legislative intent, as we illustrated in our letter of July 28.

While the addition of "de novo" into the proposed final draft language of paragraph 23 of your administrative procedures pertaining to appeals, and in this instance an appeal of the BDCP certification, provided clarity, we repeat our objection that it is beyond the Council's authority and its proper role as established in the Act. We concur with Council Member Marcus who stated she "does not read" a "de novo" BDCP review role for the Council as a part of the Act. Instead, the Council's ability to review a third party appeal of the DFG certification of the BDCP under section 85320 (which will entail an open and transparent process itself) was intended to provide a check that DFG had not arbitrarily carried out its responsibilities by ignoring significant criteria or approving an NCCP that was inconsistent with the requirements of the NCCPA.. This interpretation is consistent with traditional review of agency actions by an oversight body, whether it is the Council or the Courts. To replace the professional judgment of the expert agency, the standard must be that there is no substantial evidence in the record that supports the agency's decision. We repeat our contention that that is the appropriate standard in this instance as well.

Directors

James M. Beck
*Kern County Water
Agency*

Jeff Kightlinger
*Metropolitan Water
District of Southern
California*

Bill Harrison
Dan Nelson
Jason Peltier
*San Luis & Delta-
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Steve Robbins
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*State Water Project
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Tom Birmingham
*Westlands Water
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With regard to CEQA compliance for the BDCP and satisfaction of the related specified requirements in the Act, the Council will have already had a role in the process through its activities as a Responsible Agency. We expect the Council, should it have concerns about whether the BDCP EIR/EIS satisfies CEQA and related criteria under section 85320(b)(2), would raise them in writing to the lead agencies, as would be standard practice. Consequently, there should be no surprises as the environmental documents are finalized and it should be expected that reasonable concerns raised by the Council would be satisfactorily addressed. Further, if this is not the case, CEQA itself, in Guidelines section 15231, establishes the process for addressing responsible agency concerns with a final EIR. In the absence of a legal challenge to the EIR by the responsible agency, the responsible agency is required to treat the EIR as adequate until adjudged otherwise in a timely filed court proceeding. This process would need to be followed by the Council as section 85322 states that the Act does not alter the obligations otherwise required by CEQA.¹

Finally, the provision allowing for the Council to appeal the DFG's NCCP and CEQA certifications to itself is inappropriate and inconsistent with the appellate role provided to the Council by the Act. In the absence of an appeal by a third party, the Act clearly states that the Council, upon receipt of the DFG certification, "shall" incorporate the BDCP into the Delta plan. Only if an appeal is filed does the Council's appellate authority arise. In other words, the appellate review body must await an appeal by a third party before it can carry out its function and exercise its judgment. To do otherwise turns the notion of the Council's proper appellate role on its head and belies a potential lack of impartiality central to that role.² We respectfully request that the Council remove the provision allowing it to appeal the DFG certifications to itself for review.

In addition, consistent with the Council's appropriate standard of review with respect to the BDCP under section 85320, which we've outlined above and detailed in our letter of July 28, we offer the following language as substitutes for paragraphs 23 and 25 of the final draft administrative procedures considered at your August meeting:

23. The council's decision shall be based on review of the department's record to determine whether the department has abused its discretion by not proceeding in the manner required by law, by not supporting its determinations with findings, or by not supporting its findings with substantial evidence in light of the whole record. The Council's decision shall include specific written findings.

25. The department may revise its determination to meet the issues raised by the council, or may respond to the council's issues in detail, setting forth

¹ This approach will also be applicable to the matters required to be included within the BDCP EIR/EIS under section 85320(b)(2), as any issues regarding their treatment are unlikely to relate to whether they were included in the EIR, but rather whether their discussion and analysis meet CEQA requirements for an adequate EIR.

² The clear legislative statement that the Council is acting as an appellate body definitively establishes that the scope of review must be consistent with that provided to other appellate bodies, namely, in this case, abuse of discretion/lack of substantial evidence.

reasons why it has concluded that the plan meets all of the requirements of section 85320.

We also request that the newly proposed Section 22.5 be deleted in its entirety. In particular, paragraphs 22.5(b) and (c) inappropriately allow for the submittal of information beyond that in the record before the DFG when it applies its expert judgment to the question of BDCP NCCP and CEQA certification under the Act. Paragraphs (a) and (d-g) are common-sense administrative guidelines that do not need to be codified.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Byron M. Buck", with a stylized, flowing script.

Byron M Buck

Executive Director